**2004 BNH 024** **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

# UNITED STATES BANKRUPTCY COURT
# DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-10700-JMD
Chapter 11

Clarkeies Market, L.L.C.,
Debtor

Clarkeies Market, L.L.C.,
Plaintiff

v. Adv. No. 03-1310-JMD

Estate of Karl C. Kelley,
Ruth C. Kelley, Personal Representative,
Kelley's Food Town, Inc., and
K&R Supermarkets, Inc.,
Defendants

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## MEMORANDUM OPINION

## I. INTRODUCTION

The Debtor filed this adversary proceeding against Defendants, Karl C. Kelley ("Kelley"),[1] Kelley's Food Town, Inc. ("KFT"), and K&R Supermarkets, Inc. ("K&R")

[1] After his death, the Court granted a motion to substitute the Estate of Karl C. Kelley, Ruth C. Kelley, Personal Representative, for Defendant Karl C. Kelley. See Doc. No. 20.

(collectively the "Defendants" or the "Kelley Group") alleging that the Defendants breached covenants not to compete contained in the Debtor's asset purchase agreements for its purchase of the Woodsville and Berlin stores and therefore the Debtor is excused from its payment obligations under the promissory notes held by the Defendants and entitled to recover money damages from the Defendants. The Defendants filed a motion seeking summary judgment in their favor (Doc. No. 33) (the "Motion") because they argue that the Debtor will not, has not, and cannot offer any evidence on the issue of actual competition, a necessary component, according to the Defendants, of the contractual noncompete provisions on which the Debtor's claims are based. The Debtor objected to the Motion (Doc. No. 26) on the grounds that it need not produce evidence regarding actual competition and that even if it were required to do so, there are genuine factual issues as to the existence of actual competition that would preclude summary judgment. The Court held a hearing on the Motion on October 7, 2004, and, after hearing the arguments of counsel, took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## II. FACTS

On November 30, 1998, the Debtor purchased from the Defendants certain business assets utilized in the operation of retail grocery stores in Woodsville and Berlin, New

Hampshire.[2] In connection with the purchase of the store assets, the Debtor executed two separate asset purchase agreements (the "Asset Purchase Agreements"). An agreement between the Debtor and KFT pertained to the assets at the Woodsville store and an agreement between the Debtor and K&R d/b/a Kelley's Food Town pertained to the assets at the Berlin store. Each Asset Purchase Agreement contained identical covenants not to compete that specifically provided as follows:

> Non-Competition. The Seller, its affiliates, shareholders, directors and officers, will not, for a period of ten (10) years, directly or indirectly, in any manner whatsoever, engage in the business of, operate, manage, control or otherwise assist or be connected with or lend money to or own or have any other interest in or right with respect to (other than through ownership of not more than one percent of the outstanding shares of a corporation's stock which is listed on a national securities exchange) any business or enterprise located or operating within sixty (60) miles of the Premises, which competes or shall compete with the Buyer or any subsidiary thereof with respect to the ownership or operation of a retail grocery store.

Article 4.3 of the Asset Purchase Agreements. On the same day that the Debtor purchased the Woodsville and Berlin store assets, an entity known as Franconia Food Center, Inc. ("Franconia Food") purchased assets of a store located in Franconia owned by KFT.[3] The Defendants stipulated for purposes of their Motion that the Woodsville and Berlin stores were located within sixty miles of the Franconia store.

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[2] The Woodsville asset purchase agreement provided for the sale of inventory, equipment, business records, and goodwill by KFT to the Debtor. The Berlin asset purchase agreement provided for the sale of inventory, equipment, business records, and goodwill by K&R d/b/a Kelley's Food Town to the Debtor. It does not appear that Kelley individually was a seller of either store.

[3] In their pleadings, the parties indicate that Alan Hall, an employee at the Franconia store, purchased the Franconia store assets. However, the asset purchase agreement states that the actual buyer was Franconia Food, presumably a corporation owned and operated by Hall. Again, it does not appear that Kelley individually was a seller of that store.

In connection with all three sales, the Defendants provided seller financing to both the Debtor and Franconia Food by agreeing to accept promissory notes from both. It appears from the summary judgment record, as evidenced by an asset promissory note dated November 30, 1998, that Franconia Food borrowed money from KFT and from Kelley individually to finance its purchase of the Franconia store. The proofs of claim on file with the Court contain copies of asset promissory notes dated November 30, 1998, which show that the Debtor borrowed money from KFT and Kelley individually to finance its purchases of the Woodsville store and from K&R and Kelley individually to finance its purchase of the Berlin store. Payment of each of the three notes was guaranteed by the respective shareholders of each buyer and Associated Grocers of New England, Inc. ("AGNE"), the grocery supplier to all three stores.

It also appears from the summary judgment record that on November 30, 1998, Kelley as Trustee of The Karl C. Kelley Trust-1997, and Ruth C. Kelley as Trustee of The Ruth C. Kelley Trust-1997, leased the Franconia store real estate to Associated Lease Corp., which in turn subleased the property to Franconia Food. It also appears that the Franconia store has continued to operate under the name of "Kelley's Food Town," which tradename was sold by KFT to Franconia Food as part of the asset purchase agreement with respect to the Franconia store.

## III. DISCUSSION

The Debtor contends in its amended complaint (the "Amended Complaint") that by providing seller financing for the Franconia store, leasing the Franconia store premises to Franconia Food, and permitting the Franconia store to operate as "Kelley's Food Town," the Defendants breached the covenants not to compete contained in the Debtor's Asset Purchase

Agreements. The Debtor contends further that in light of these breaches and the Kelley Group's inequitable and wrongful conduct the Debtor is entitled to the following relief:

1. The Debtor's performance under the notes for the purchase of the Woodsville and Berlin stores should be excused;

2. The Kelley Group's secured and unsecured claims should be zero;

3. The Defendants' claims and liens should be equitably subordinated to the claims of other creditors and their liens should be transferred to the Debtor's bankruptcy estate; and

4. The Debtor should be entitled to an award of damages.[4]

The Kelley Group denies that the Debtor is entitled to any such relief.

The standard for summary judgment is well established.[5] An order granting summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Barbour v. Dynamics Research Corp., 63 F.3d 32, 36-37 (1st Cir. 1995). When considering summary judgment, the Court should draw all reasonable inferences from the facts in the manner most favorable to the non-movant. See Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763 (1st Cir. 1994).

Federal Rule of Civil Procedure 56(e) further provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

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[4] Specifically, the Amended Complaint contains four counts: Count I (Breach of Non-Compete: Woodsville); Count II (Breach of Non-Compete: Berlin); Count III (Equitable Subordination under 11 U.S.C. § 510(c)); and Count IV (Disallowance of Claims under 11 U.S.C. § 502).

[5] Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Consequently, a party opposing summary judgment must "present definite, competent evidence to rebut the motion." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994); see also Torres v. E.I. Dupont de Nemours & Co., 219 F.3d 13, 18 (1st Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)) ("'[T]he mere existence of a scintilla of evidence' is insufficient to defeat a properly supported motion for summary judgment."). Motions for summary judgment must be decided "on the record as it stands, not on litigants' visions of what the facts might some day reveal." Maldonado-Denis, 23 F.3d at 581. "[B]rash conjecture, coupled with earnest hope that something concrete will eventually materialize, is insufficient to block summary judgment." Id. (citation and quotation omitted). Thus, the non-movant bears the burden of placing at least one material fact into dispute once the moving party offers evidence of the absence of a genuine issue. See Crawford v. Lamantia, 34 F.3d 28, 31 (1st Cir. 1994).

> A "genuine" issue is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor or either party." Put another way, a "genuine" issue exists if there is "sufficient evidence supporting the claimed factual dispute" to require a choice between "the parties' differing versions of the truth at trial." A "material" issue is one that "affect[s] the outcome of the suit," that is, an issue which, perforce, "need[s] to be resolved before the related legal issues can be decided."

Maldonado-Denis, 23 F.3d at 581 (citations omitted).

Although the evidence presented is to be viewed in the light most favorable to the nonmoving party, "[a]s to any essential factual element of its claim on which the non-movant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to

generate a trial worthy issue warrants summary judgment to the moving party." McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001) (citation and quotation omitted). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 10 Lawrence P. King, Collier on Bankruptcy ¶ 7056.05 (15th ed. rev. 2002) (citing Anderson, 477 U.S. at 249). Therefore, an inadequate opposition to a motion for summary judgment can eliminate the objecting party's ability to raise factual issues warranting trial. See Adams Co-op. Bank v. Greenberg (In re Greenberg), 229 B.R. 544, 548 (B.A.P. 1st Cir. 1999).

**A. Kelley's Claims**

Upon close examination of the summary judgment record, the Court finds that none of the asset purchase agreements were executed by Kelley in his individual capacity. Rather, he executed the Woodsville and Franconia asset purchase agreements only as president of KFT and the Berlin asset purchase agreement only as president of K&R. Because Kelley never signed the asset purchase agreements in his individual capacity, he is not a party to the agreements and therefore could not have breached any part of the agreements, including their noncompete provisions. See Meredith Hardware, Inc. v. Belknap Realty Trust, 117 N.H. 22, 24 (1977). For that reason, the Court must grant summary judgment in favor of the Estate of Karl C. Kelley with regard to the issue of whether Kelley breached the covenants not to compete, which alleged breaches are what form the basis for the relief sought against the Estate of Karl C. Kelley in Counts I and II of the Amended Complaint.

In addition, while the Debtor alleges in the Amended Complaint that Kelley acted wrongfully and inequitably as to the Debtor, such allegations are substantially based on the

alleged breaches of the covenants not to compete. The Debtor has made no allegations and submitted no evidence that Kelley had any other duties or obligations to the Debtor other than those required by the agreements with the Debtor that he executed in a personal capacity; such agreements appear limited to the notes that Kelley signed as lender. Accordingly, the Debtor cannot establish as a legal matter that the Debtor engaged in wrongful and inequitable conduct. For that reason, the Court must also grant summary judgment in favor of the Estate of Karl C. Kelley with respect to Counts III and IV of the Amended Complaint.

To the extent that the Debtor has suggested that Kelley somehow breached a duty to the Debtor based on upon the lease of the Franconia premises to Associated Lease Corp. which then in turn leased the premises to Franconia Food, the Court finds that such lease was not executed by Kelley in his individual capacity but rather by Kelley as Trustee of The Karl C. Kelley Trust-1997. As outlined above, only K&R and KFT agreed not to compete with the Debtor in accordance with the terms of the Assets Purchase Agreements. Kelley as Trustee of The Karl C. Kelley Trust-1997 made no such agreement and therefore had no obligation nor duty not to compete or to act equitably toward the Debtor.

**B. K&R's Claims**

Upon review of the summary judgment record, the Court finds no connection between K&R and the operation of the Franconia store. As detailed above, the seller of the Franconia store assets was KFT. The entities that provided financing to Franconia Food were KFT and Kelley individually. Accordingly, the Court has no legal basis to find that K&R has violated the noncompete provision found in the only asset purchase agreement it signed, the one for the Berlin store. For that reason, the Court must grant summary judgment in favor of K&R with

regard to the Debtor's claims in Counts I and II of the Amended Complaint. Further the Court must also grant summary judgment in favor of K&R with regard to the Debtor's claims in Counts III and IV of the Amended Complaint because, as with Kelley, the Debtor's allegations that K&R acted wrongfully and inequitably as to the Debtor are substantially based on the alleged breaches of the covenants not to compete. The Debtor has made no allegations and submitted no evidence that K&R had any duties or obligations to the Debtor other than those required by its agreements with the Debtor, which agreements appear limited to the asset purchase agreement for the Berlin store.

**C. KFT's Claims**

KFT, as seller of the Woodsville store, did agree on November 30, 1998, for itself, and its affiliates, shareholders, directors and officers,[6] that it would not to "for a period of ten (10) years, directly or indirectly, in any manner whatsoever, engage in the business of, operate, manage, control or otherwise assist or be connected with or lend money to or own or have any other interest in or right with respect to . . . any business or enterprise located or operating within sixty (60) miles of the Premises, which competes or shall compete with the Buyer or any subsidiary thereof with respect to the ownership or operation of a retail grocery store." The record reflects that KFT lent money to Franconia Food on November 30, 1998, to fund its purchase of the Franconia store assets and obtained a security interest in the store's assets. It also appears that the Franconia store has continued to operate under the name of "Kelley's Food Town," which tradename was sold by KFT to Franconia Food as part of the Franconia store asset purchase

[6] While KFT signed the asset purchase agreement, none of its affiliates, shareholders, directors, and officers executed it. Accordingly, as the Court explained previously in section III.A of this opinion regarding the Debtor's claims against Kelley, none of KFT's affiliates, shareholders, directors, or officers, including Kelley, can be held liable for breach of the noncompete provision.

agreement. For purposes of summary judgment, KFT has stipulated that the Franconia store was located within sixty miles of the Debtor's Woodsville store.[7]

Before the Court can determine whether KFT breached the noncompete provision contained in the asset purchase agreement, the Court must examine the provision and decide its meaning since KFT argues that the provision requires the Debtor to establish actual competition between the Woodsville and Franconia stores while the Debtor argues that it must merely establish that KFT was involved in another retail grocery store business within sixty miles of the Debtor's store.

The proper interpretation of a contract is ultimately a question of law for the Court. Lawyers Title Ins. Corp. v. Groff, 148 N.H. 333, 336 (2002) (quotations and citations omitted); Royal Oak Realty Trust v. Mordita Realty Trust, 146 N.H. 578, 581 (2001) (quotation and citation omitted); Merrimack School Dist. v. Nat'l School Bus Serv., Inc., 140 N.H. 9, 11 (1995) (quotation and citation omitted); Restaurant Operators, Inc. v. Jenney, 128 N.H. 708, 710 (1986) (citation omitted). When interpreting a written agreement, the Court must give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was executed, and reading the agreement as a whole. Lawyers Title Ins. Corp., 148 N.H. at 336-37 (quotation and citation omitted); Royal Oak Realty Trust, 146 N.H. at 581 (quotation and citation omitted); Merrimack School Dist., 140 N.H. at 11 (citation omitted). The parties' intent will be determined from the plain meaning of the language used in the agreement, absent ambiguity. Lawyers Title Ins. Corp., 148 N.H. at 337 (quotation and citation omitted); Royal Oak Realty Trust, 146 N.H. at 581 (quotation and citation omitted). "A clause is

[7] The Court's understanding is that the Woodsville store continues to be operated by AGNE pursuant to the Court's order granting relief from the automatic stay in March 2001.

ambiguous when the contracting parties reasonably differ as to its meaning." Merrimack School Dist., 140 N.H. at 11 (quoting Laconia Rod & Gun Club v. Hartford Acc. & Indemn. Co., 123 N.H. 179, 182 (1983)). "When there is a question of fact concerning what was intended by certain terms within a contract, the dispute is to be resolved by the trier of fact, whose findings will be upheld if supported by the evidence." R. Zoppo Co. v. City of Dover, 125 N.H. 666, 671 (1984) (citing Peabody v. Wentzell, 123 N.H. 416, 418-19 (1983) and cited in Restaurant Operators, Inc., 128 N.H. at 710). When parties use expansive, unrestricted language, the Court should give those phrases their normal, broad reading. Merrimack School Dist., 140 N.H. at 13 (citations omitted).

"The public policy of New Hampshire encourages free trade and discourages covenants not to compete." Concord Orthopaedics Prof. Ass'n v. Forbes, 142 N.H. 440, 442 (1997) (citation omitted). Accordingly, "covenants not to compete are generally narrowly construed and cannot be extended past the fair and natural import of the language used." Gosselin v. Archibald, 121 N.H. 1016, 1022 (1981) (internal quotations omitted) (citing Moore v. Dover Veterinary Hosp., Inc., 116 N.H. 680, 686 (1976) (quoting Bowers v. Whittle, 63 N.H. 147, 148 (1884)); see Centorr-Vacuum Indus., Inc. v. Lavoie, 135 N.H. 651, 654 (1992). However, where a noncompetition covenant is ancillary to the sale of a business, it may be interpreted more liberally. Centorr-Vacuum Indus., Inc., 135 N.H. at 654.

Thus, in general, covenants not to compete are "valid and enforceable if the restraint is reasonable, given the particular circumstances of the case." Technical Aid Corp. v. Allen, 134 N.H. 1, 8 (1991); see Genex Cooperative, Inc. v. Bujnevicie, 2000 DNH 153, No. Civ. 00-120-M, 2000 WL 1507319, at * n.12 (D.N.H. 2000) (citation omitted); Concord Orthopaedics Prof.

Ass'n, 142 N.H. at 442; Moore, 116 N.H. at 684 (quotation and citations omitted). The interpretation of the terms of a covenant not to compete and the covenant's reasonableness are matters of law for the Court to decide. Concord Orthopaedics Prof. Ass'n, 142 N.H. at 443; Centorr-Vacuum Indus., Inc., 135 N.H. at 654.

As previously set forth, KFT agreed as seller of the Woodsville store not to compete as follows:

> The Seller . . . will not, for a period of ten (10) years, directly or indirectly, in any manner whatsoever, engage in the business of, operate, manage, control or otherwise assist or be connected with or lend money to or own or have any other interest in or right with respect to . . . any business or enterprise located or operating within sixty (60) miles of the Premises, which competes or shall compete with the Buyer or any subsidiary thereof with respect to the ownership or operation of a retail grocery store.

The issue raised by the Kelley Group is whether the Debtor must demonstrate that KFT's activities related to the Franconia store were in connection with a business or enterprise "which competes or shall compete with the [Debtor] . . . with respect to the ownership or operation of a retail grocery store." In other words, the issue before the Court is whether the Debtor must prove as an element of its breach of contract claim that the Franconia store actually competed with the operation or ownership of the Debtor's Woodsville store. According to the Debtor, it is not required to offer such proof; rather, the language of the covenant not to compete provides that operating or assisting the operation of a retail grocery store business within a sixty-mile radius constitutes competition per se.

In deciding this issue the Court has examined the New Hampshire Supreme Court's decision in Technical Aid Corp. v. Allen, 134 N.H. 1, 9 (1991), wherein the Supreme Court held that the prohibition of "competition" or "competitive activities" in a restrictive covenant is not so

vague as to render the covenant unreasonable per se. The Supreme Court went on to explain that "[w]here, as here, one company replaces another as a supplier of a given service to a specific customer, we think it defies logic to assert that competition is not involved." Id. at 20.

The Court thinks it defies logic in this proceeding to assert that the Debtor must establish actual competition between the Franconia store and the Woodsville store where it is uncontested that both engaged in the retail grocery store business within a sixty mile radius. While the noncompete provision could perhaps have been more artfully drawn, the Court does not find the provision ambiguous and agrees with the Debtor that the most reasonable interpretation is that it only requires the stores to be involved in the same competitive business, i.e., the retail grocery store business, within the prohibited geographical area. To force the Debtor to prove that the Franconia store competed with the Woodsville store would put a stiff burden on the Debtor, a burden that does not appear to have been contemplated by the terms of the noncompete provision, nor upon reading the agreement as a whole, especially given the fact that the Debtor was paying a substantial sum of money for KFT's covenant not to compete.

In the Court's view, reading the record in the light most favorable to the Debtor, the Debtor has alleged sufficient facts that might demonstrate that KFT violated the noncompete provision of the Woodsville asset purchase agreement. For that reason, the Court must deny KFT's motion for summary judgment as to Counts I, III, and IV of the Amended Complaint. As Count II relates only to the Berlin store, a transaction in which KFT took no part, KFT is entitled to summary judgment with respect to that count.

## IV. CONCLUSION

For the reasons set forth above, the Court shall enter a separate order granting in part and denying in part the Motion. A trial on the Debtor's claims against KFT in Counts I, III, and IV of the Amended Complaint shall commence on January 20 and 21, 2005, as previously ordered by the Court. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: November 29, 2004

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge